Malacca Securities Sdn Bhd v Loke Yu

HIGH COURT (MELAKA) — CIVIL SUIT NO 22-54 OF 1997
AUGUSTINE PAUL J
12 JUNE 1998

Civil Procedure *— Jurisdiction — Forum conveniens — Defendant reside in Kuala Lumpur — Transactions between parties occurred in Melaka — Interpretation of s 23(1) of Courts of Judicature Act 1964 — Where cause of action accrued — Whether court is forum conveniens to hear dispute notwithstanding it has jurisdiction to do so — Courts of Judicature Act 1964 s 23(1)(a) & (b)*

The plaintiff was a licensed stockbroker with its registered office in Melaka. The defendant operated an account with the plaintiff and used its services for transacting in shares. The defendant's last known address was in Kuala Lumpur. The plaintiff filed an action against the defendant in the High Court in Malaya at Melaka. The defendant filed an application to have the action transferred to the High Court in Malaya at Kuala Lumpur based on s 23(1)(a) and (b) of the Courts of Judicature Act 1964 ('the CJA'). The defendant contended that the trial of the action in Melaka would inconvenience him and cause him a greater expenditure as he and his witnesses were from Kuala Lumpur. The defendant also said that the cause of action arose in Kuala Lumpur. The plaintiff contended that the defendant used its services to carry out his share transactions in Melaka and that the cause of action arose in Melaka.

Held, dismissing the application:

(1) A plaintiff is entitled to file an action in any branch of the High Court in Malaya regardless of whether the cause of action arose in another state. Therefore, the court had jurisdiction to entertain this action even if the defendant was correct in his submission that the cause of action arose in Kuala Lumpur coupled with the fact that he resides there also (see p 119B).

(2) The critical issue for determination is whether the court is the forum conveniens to hear the dispute between the parties notwithstanding the fact that it has jurisdiction to do so. A court which has jurisdiction to hear a case can lawfully decline to exercise its jurisdiction on the ground that the case must be heard by a more accessible court. In declining to exercise jurisdiction, a court does so not on grounds of convenience but of suitability or appropriateness of another tribunal in the interest of all the parties and for the ends of justice (see p 119C–120B).

(3) The comma appearing at the end of sub-para (a), (b), (c) and (d) in s 23(1) of the CJA followed by the word 'or' means that they must be construed disjunctively. Thus, a party instituting a proceeding in a particular branch of the High Court may do so if his case falls within any one of the subparagraph (see p 126H–I).

(4) With regard to accrual of a cause of action in contract cases, it is deemed to have occurred at the place where the breach took place.

In a contract for the payment of money, the breach occurs when there is a failure to pay the sum promised. This is logical as the meaning of 'cause of action' is the act on the part of the defendant which gives the plaintiff his cause of complaint. The failure to pay will be the cause of complaint. The breach will have to be at the place where the payment is to be made and the cause of action will therefore accrue in that place. Where there is no agreement as to the place where the payment should be made, then thepaymentshould be made at the place where the plaintiff lives (see p 127B–G).

(5) In the present case, the plaintiff's registered address is in Melaka. The defendant opened an account with the plaintiff in Melaka. The defendant conducted his share transactions in Melaka. The amount due on the account is therefore payable in Melaka. If there was to be any dispute on this issue, it is resolved by the fact that the plaintiff's registered office is in Melaka therefy making Melaka the venue for payment of the sum due. In the circumstances, the breach in payment of the sum due occurred in Melaka. The plaintiff's cause of action therefore arose in Melaka. The plaintiff's case also comes within sub-para (c) as the facts on which the action was based occurred in Melaka. As the plaintiff had brought itself within s 23(1)(a) and (c) of the CJA, it was entitled to file this action in Melaka notwithstanding the fact that the defendant resides in Kuala Lumpur. The defendant's application was therefore without merit (see p 127H–128B).

[Bahasa Malaysia summary

Plaintif dahulunya merupakan broker saham yang berlesen dengan pejabat berdaftarnya di Melaka. Defendan mengoperasikan sebuah akaun dengan plaintif dan menggunakan perkhidmatan-perkhidmatan plaintif untuk bertransaksi dalam saham-saham. Alamat terakhir defendan yang diketahui adalah di Kuala Lumpur. Plaintif memfailkan suatu tindakan terhadap defendan di dalam Mahkamah Tinggi Malaya di Melaka. Defendan memfailkan suatu permohonan untuk memindahkan tindakan tersebut ke Mahkamah Tinggi Malaya di Kuala Lumpur berdasarkan s 23(1)(a) dan (b) Akta Mahkamah Kehakiman 1964 ('AMK tersebut'). Defendan menegaskan bahawa perbicaraan tindakan di Melaka akan menimbulkan kesulitan kepada beliau dan menyebabkan suatu perbelanjaan yang lebih memandangkan beliau dan saksi-saksi beliau adalah dari Kuala Lumpur. Defendan juga mengatakan bahawa kausa tindakan tersebut timbul di Kuala Lumpur. Plaintif menegaskan bahawa defendan telah menggunakan perkhidmatan-perkhidmatan plaintif untuk menjalankan transaksi-transaksi saham beliau di Melaka dan bahawa kausa tindakan timbul di Melaka.

Diputuskan, menolak permohonan tersebut:

(1) Seseorang plaintif adalah berhak untuk memfailkan suatu tindakan di mana-mana cawangan Mahkamah Tinggi di Malaya

tanpa mengambil kira sama ada kausa tindakan tersebut timbul di sebuah negeri yang lain. Maka, mahkamah mempunyai bidang kuasa untuk mendengar tindakan ini walaupun jika defendan adalah betul di dalam hujahan beliau bahawa kausa tindakan tersebut timbul di Kuala Lumpur dan ditambah pula dengan fakta bahawa beliau bermastautin di situ juga (lihat ms 119B).

(2) Isu kritikal untuk diputuskan adalah sama ada mahkamah ini merupakan forum conveniens untuk mendengar pertikaian antara pihak-pihak tersebut meskipun ia mempunyai bidang kuasa untuk berbuat demikian. Sesebuah mahkamah yang mempunyai bidang kuasa untuk mendengar suatu kes boleh secara sahnya menolak untuk menggunakan bidang kuasanya atas alasan bahawa kes tersebut mesti didengar oleh sebuah mahkamah yang lebih mudah didatangi. Dalam tidak menggunakan bidang kuasanya, sesebuah mahkamah berbuat demikian bukannya atas alasan-alasan kesenangan tetapi kesesuaian sebuah tribunal yang lain demi kepentingan semua pihak-pihak tersebut dan untuk matlamat keadilan (lihat ms 119C–120B).

(3) Tanda koma yang didapati pada akhir subperenggan (a), (b), (c) dan (d) di dalam s 23(1) AMK tersebut yang diikuti dengan perkataan 'atau' bermaksud bahawa ia mesti ditafsirkan secara disjunktif. Maka, pihak yang memulakan suatu prosiding di sesebuah cawangan Mahkamah Tinggi yang tertentu boleh berbuat demikian jika kes beliau adalah tergolong di bawah mana-mana subperenggan tersebut (lihat ms 126H–I).

(4) Berkenaan dengan keakruan kausa tindakan dalam kes-kes kontrak, ia adalah disifatkan telah berlaku di tempat di mana kemungkiran telah berlaku. Dalam suatu kontrak untuk pembayaran wang, kemungkiran berlaku apabila terdapatnya kegagalan untuk membayar jumlah yang telah dijanjikan. Ini adalah logikal memandangkan maksud 'kausa tindakan' adalah perbuatan oleh defendan yang memberi kepada plaintif tersebut kausa aduan beliau. Kegagalan untuk membayar akan merupakan kausa aduan tersebut. Kemungkiran seharusnya berlaku di tempat di mana pembayaran seharusnya dibuat dan kausa tindakan tersebut maka akan berakru di tempat tersebut. Apabila tiada perjanjian berkenaan dengan tempat di mana pembayaran seharusnya dibuat, maka pembayaran tersebut seharusnya dibuat di tempat di mana plaintif tinggal (lihat ms 127B–G).

(5) Di dalam kes kini, alamat berdaftar plaintif adalah di Melaka. Defendan telah membuka sebuah akaun dengan plaintif di Melaka. Defendan mengendalikan transaksi-transaksi saham beliau di Melaka. Jumlah yang sepatutnya daripada akaun tersebut maka adalah mesti dibayar di Melaka. Jika terdapatnya pertikaian berkenaan dengan isu ini, ia adalah diselesaikan oleh fakta bahawa alamat berdaftar plaintif adalah di Melaka dan dengan demikian menjadikan Melaka tempat untuk pembayaran jumlah yang sepatutnya. Dalam keadaan-keadaan tersebut,

kemungkiran pembayaran jumlah yang sepatutnya adalah berlaku di Melaka. Kausa tindakan plaintif dengan demikian timbul di Melaka. Kes plaintif adalah turut tergolong di bawah subperenggan (c) memandangkan fakta-fakta atas mana tindakan tersebut adalah didasarkan berlaku di Melaka. Memandangkan plaintif telah menbawa dirinya sebagai tergolong di bawah s 23(1)(a) dan (c) AMK tersebut, ia adalah berhak untuk memfailkan tindakan ini di Melaka meskipun defendan adalah bermastautin di Kuala Lumpur. Permohonan defendan tersebut adalah dengan demikian tanpa merit (lihat ms 127H–128B).]

Notes

For a case on forum conveniens, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 2909.

Cases referred to

Asia Insurance Co Ltd, Re Application of [1968] 2 MLJ 228 (refd)
Atlantic Star, The [1973] 2 All ER 175 (refd)
Arunima Das v Secretary, Board of Secondary Education AIR 1957 Cal 182 (refd)
Bank Bumiputra Malaysia Bhd v Melewar Holdings Sdn Bhd & Ors [1990] 1 CLJ 1246 (refd)
Chua Toh Hua & Anor v Lee Cheng Giam & Anor [1949] MLJ 33 (refd)
Cuban Atlantic Sugar Sales Corp v Compania De Vapores San Elefterio Limitada [1960] 1 All ER 141 (refd)
Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd [1990] 1 MLJ 191 (refd)
Fung Beng Tiat v Marid Construction Co [1996] 2 MLJ 413 (refd)
Hyman v Helm (1883) 24 Ch D 531 (refd)
Humphreys v Edwards (1875) 1 Char Pr Cas 81 (refd)
Jackson v Spittall (1870) LR 5 CP 542 (refd)
Khor Seow Kee v Boon Hock Sawmill Sdn Bhd [1993] 4 CLJ 365 (refd)
Lam Kok Trading Co (Pte) Ltd & Anor v Yorkshire Switchgear & Engineering Co Ltd [1979] 1 MLJ 239 (refd)
Lee Lee Cheng v Seow Peng Kwang [1960] MLJ 1 (refd)
Logan v Bank of Scotland & Ors (No 2) [1906] 1 KB 141 (refd)
Loke Wan Tho v Lachie Mcdonald & Ors [1949] MLJ 293 (refd)
Madras & Southern Maharatta Rly Co Ltd v Bezwada Municipality AIR 1944 PC 71 (refd)
Mc Henry v Lewis (1883) 22 Ch D 397 (refd)
Megayacht Sdn Bhd v Hong Leong-Lurseen Shipyard [1992] *Sdn Bhd* [1997] 2 CLJ Supp 48 (refd)
Mullins v The Treasurer of The County of Survey (1880) 5 QBD 170 (refd)
Narendra Nath Nandi v Amiya Chowdry 63 CWN 216 (refd)
Northey Stone Co v Gidney [1894] 1 QB 99 (refd)

Peruvian Guano Co v Bockwoldt (1883) 23 Ch D 225 (refd)
PP v Oie Hee Koi & Associated Appeals [1968] 1 MLJ 148 (refd)
PP v Seeralan [1985] 2 MLJ 30 (refd)
Pramatha Nath v State of West Bengal 70 CWN 503 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Scotch Leasing Sdn Bhd (In receivership) v Chee Pok Choy & Ors [1997] 2 MLJ 105 (refd)
Sim v Robinow (1892) 19 R 665 (refd)
Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd [1988] 2 MLJ 268 (refd)
Spiliada Maritime Corp v Consulex Ltd [1987] AC 460 (refd)
St Pierre & Ors v South American Stores (Gath & Chaves) Ltd & Ors [1936] 1 KB 382 (refd)
Sterling, Re; Ex parte Esanda Ltd (1980) 30 ALR 77 (refd)
Surinder Singh v Central Government & Ors AIR 1986 SC 2166 (refd)
Syarikat Nip Kui Cheong Timber Contractor v Safety Life & General Insurance Co Sdn Bhd [1975] 2 MLJ 115 (refd)
Tan Choon Chye v Singapore Society of Accountants [1979] 2 MLJ 61 (refd)
Thangaman v Chief Secretary, Madras AIR 1965 Mad 225 (refd)
Thornton v Thornton (1886) 11 PD 176 (refd)
Tung Lian Enterprise v Poly Trading Co [1993] 4 CLJ 189 (refd)
Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508 (refd)

Legislation referred to

Courts of Judicature Act 1964, ss 3, 20, 23(1), Schedule, para 12
Federal Constitution art 121
Rules of the High Court 1980 O 12 r 4

CK Lim (*Sekar a/l Palaniandy* with him) (*Shareena Abdullah & Lim*) for the plaintiff.

CY Choong (*S S Tieh* with him) (*Paul Ong & Associates*) for the defendant.

LK Tiu (*Koh Kim Leng & Co*) for the counterclaimant.

Augustine Paul J: The plaintiff is a licensed stockbroker with its registered address at No 171, Jalan Bunga Raya, 75100 Melaka. The defendant, whose last known address was at No 23, Persiaran Syed Putra, 50460 Kuala Lumpur, operated an account with the plaintiff and used its services for transacting in shares. The plaintiff's action against the defendant, filed in the High Court in Malaya at Melaka, is for the sum of RM3,509,323.29 and interest due on his account arising from share transactions. The defendant denied the claim and contended that the amount due arose as a result of collusion between the plaintiff and one Lim Teck Meng who had used his account for the purchase of shares thereby incurring the debt. The defendant brought a counterclaim against Lim Teck Meng pursuant to O 5 r 3 of the Rules of the High Court 1980.

On 26 January 1998 the defendant filed an application to have this action transferred to the High Court in Malaya at Kuala Lumpur based on s 23(1)(a) and (b) of the Courts of Judicature Act 1964 ('the CJA'). In his affidavit in support of the application he affirmed that his address is in Kuala Lumpur and that he works in Petaling Jaya, Selangor. Thus, he said, the trial of the action in Melaka would inconvenience him and cause him a greater expenditure as he and his witnesses are from Kuala Lumpur. In opposing the application the plaintiff affirmed in its affidavit-in-reply that the defendant used its services to carry out his share transactions in Melaka and that the cause of action arose in Melaka. The plaintiff further said that as its witnesses would be from Melaka the appropriate forum to hear the action ought to be the High Court in Malaya at Melaka. The application was heard on 20 April 1998. Learned Counsel for the defendant repeated what had been affirmed in the affidavit by the defendant. He also said that the cause of action arose in Kuala Lumpur. As such, he contended, this action should be heard in the High Court in Malaya at Kuala Lumpur in accordance with s 23(1) of the CJA. In support of his argument he referred to cases such as *Fung Beng Tiat v Marid Construction Co* [1996] 2 MLJ 413; *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 1 MLJ 191; *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268; *Tung Lian Enterprise v Poly Trading Company* [1993] 4 CLJ 189 and *Khor Seow Kee v Boon Hock Sawmill Sdn Bhd* [1993] 4 CLJ 365. In his reply learned Counsel for the plaintiff contended that the cause of action arose in Melaka and, accordingly, the High Court in Malaya at Melaka is the appropriate forum to hear this action. In support of his argument he referred to *Bank Bumiputra Malaysia Bhd v Melewar Holdings Sdn Bhd & Ors* [1990] 1 CLJ 1246 and *Megayacht Sdn Bhd v Hong Leong-Lurseen Shipyard* [1992] *Sdn Bhd* [1997] 2 CLJ Supp 48.

It is my view that cases relating to transfer of proceedings in the subordinate courts, relied on by both counsel, are not relevant to their submissions on the law relating to a similar issue in the High Court. Before I proceed any further it is first necessary to consider the scope of the power of a High Court to transfer a proceeding pending before it to another High Court. The starting point is Art 121 of the Federal Constitution which reads as follows:

> There shall be two High Courts of co-ordinate jurisdiction and status, namely —
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> (i) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and
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> (ii) one in the States of Sabah and Sarawak which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine.

The civil jurisdiction of the two High Courts is governed by s 23(1) of the CJA which reads as follows:

> Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where —

(a) the cause of action arose; A

(b) the defendant or one of several defendants resides or has his place of business;

(c) the facts on which the proceedings are based exist or are alleged to have occurred;

(d) any land the ownership of which is disputed is situated, B

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.

The phrase 'local jurisdiction' is defined in s 3 of the CJA as:

(a) in the case of the High Court in Malaya, the territory comprised in the C States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor, Terengganu and the Federal Territory of Kuala Lumpur; and

(b) in the case of the High Court in Sabah and Sarawak, the territory comprised in the States of Sabah and Sarawak, and the Federal Territory of Labuan, D

including, in either case, the territorial waters and the air space above those States and the territorial waters.

It follows that s 23(1) of the CJA read with the definition of 'local jurisdiction' in s 3 of the CJA sets out the territorial jurisdiction of the High Court in Malaya and the High Court in Sabah and Sarawak respectively E (see *Syarikat Nip Kui Cheong Timber Contractor v Safety Life & General Insurance Co Sdn Bhd* [1975] 2 MLJ 115). The effect of the provisions of law that I have referred to were neatly summarized by Gopal Sri Ram JCA in *Fung Beng Tiat v Marid Construction Co* (1996) 2 MLJ 413 at p 419 in the following terse terms:

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> First, it is crystal clear from art 121 of the Federal Constitution that there are two separate High Courts in Malaysia exercising distinct territorial jurisdiction over different geographical areas of the country. There is the High Court in Malaya and there is the High Court in Sabah and Sarawak. Each has jurisdiction over disputes that arise within its territory.

Although it is clear that there are only two High Courts in Malaysia there G are several branch High Courts in the different states of the country. The establishment of the branch High Courts is contemplated by art 121 of the Federal Constitution itself by its reference to the 'principal registry' which implies the existence of subsidiary or branch registries. On the status of these branch High Courts reference may be made to *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 where Lim Beng Choon J said at H p 270:

> It is implicit that a High Court located at Penang or at Alor Star is but a branch of the High Court in Malaya and each branch of the High Court in Malaya located in any state has concurrent jurisdiction to entertain any civil proceedings regardless of whether the cause of action arose in another state. I

In referring to this case Edgar Joseph Jr J (as he then was) said in *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508 at p 512:

A The case of *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 reminds us of the familiar proposition that the High Court of each state in our country are but branches of the High Court of Malaya and that each branch has concurrent jurisdiction to entertain any civil proceeding regardless of whether the cause of action arose in another state.

B The result is that a plaintiff is entitled to file an action in any branch of the High Court in Malaya regardless of whether the cause of action arose in another state (see *Re Application of Asia Insurance Co Ltd* [1968] 2 MLJ 228). I therefore hold that this court has jurisdiction to entertain this action even if the defendant is correct in his submission that the cause of action arose in Kuala Lumpur coupled with the fact that he resides there also. But, C as Lim Beng Choon J observed in *Sova Sdn Bhd*, that is not the end of the matter as the critical issue for determination is whether this court is the *forum conveniens* to hear the dispute between the parties notwithstanding the fact that it has jurisdiction to do so. His Lordship added at p 271:

> D However, that is not the end of the matter since the defendants have also contended that this court is not the proper or convenient forum to determine the dispute between the parties. To this contention, I agree. It is quite obvious that in creating a branch of the High Court in Malaya in each state, the legislature had two things in mind:
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> (i) to enable the parties of a civil suit to have easy access to a branch of the High Court in Malaya located in a state where either the plaintiff or the E defendant resides. When a person is sued for breach of contract or for that matter a tortious act when the breach or the tort was committed in the state where he resides, it is certainly unreasonable to require him to travel all the way, say, to Kuala Lumpur to defend himself. Apart from the expense incurred, the defendant may have to remain in Kuala Lumpur perhaps one week to participate in the civil proceedings. No doubt he would be compensated in terms of costs should he succeed in F defending himself but the inconvenience caused may outweigh the amount of costs awarded to him;
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> (ii) the obvious reason for the setting up of a branch of the High Court in every one of the 11 states is to facilitate the disposal of cases in Malaya and to cut down, even if it is not yet possible to obliterate, the backlog of cases pending in any one or more of the branches of such High Court. G
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> For the reasons as stated above, I do not think that the present civil proceedings should be dealt with by this court. I am also of the view that it is for the defendants to apply to this court for a transfer of the civil suit and the application made by the plaintiff under O 81(1) to the High Court in Malaya at Penang or Kuala Lumpur since the cause of action arose in Penang but the H parties have their places of business in Kuala Lumpur.

His Lordship therefore declined to exercise his jurisdiction to hear the case on the ground that it should be heard in another branch High Court in accordance with the doctrine of forum conveniens.

That brings into focus the circumstances in which a court which has I jurisdiction to hear a case can lawfully decline to exercise its jurisdiction on the ground that the case must be heard by a more accessible court. In declining to exercise jurisdiction a court does so not on grounds of

convenience but of the suitability or appropriateness of another tribunal in the interests of all the parties and for the ends of justice (see *Sim v Robinow* (1892) 19 R 665, *Spiliada Maritime Corp v Consulex Ltd* [1987] AC 460). In this regard reference may be made to *The Atlantic Star* [1973] 2 All ER 175 where Lord Morris of Borth-y-Gest said at pp 183–184:

> The cases show that if there is jurisdiction in the court and if a plaintiff becomes enabled to invoke it and chooses to do so he may nevertheless in some circumstances not be allowed to do so. In the decisions which indicate what those circumstances are certain words constantly emerge. They are such words as 'vexation' or 'oppression'. Thus in *McHenry v Lewis* (1882) 22 Ch D 397, Sir George Jessel MR said that it was part of the general jurisdiction of the court to prevent a defendant being 'improperly vexed' by legal procedure ... .

In *St Pierre & Ors v South American Stores (Gath & Chaves) Ltd & Ors* [1936] 1 KB 382 Scott LJ, in accordance with the principles laid down in cases such as *Mc Henry v Lewis* (1883) 22 Ch D 397; *Peruvian Guano Co v Bockwoldt* (1883) 23 Ch D 225; *Hyman v Helm* (1883) 24 Ch D 531; *Thornton v Thornton* (1886) 11 PD 176 and *Logan v Bank of Scotland & Ors (No 2)* [1906] 1 KB 141, laid down the conditions that must be satisfied in declining jurisdiction to hear a case which is otherwise properly brought on the ground that it must be heard in another court. They are:

(a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and

(b) the stay must not cause an injustice to the plaintiff.

It must be noted that these conditions were laid down in the context of staying proceedings in the court of one country when it should have been brought in the court of another country. It was on the basis of two separate jurisdictions that the court applied these conditions in *Chua Toh Hua & Anor v Lee Cheng Giam & Anor* [1949] MLJ 33. This case, on the other hand, is concerned with two courts having the same jurisdiction and yet having their own distinct jurisdiction as reflected by the judgment in *Sova Sdn Bhd* and by O 12 r 4 of the Rules of the High Court 1980 which speaks of the local jurisdiction of each High Court in Malaya. The rule reads as follows:

> References in these rules to the time limited for appearing are references —
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> (a) in the case of a writ served within the local jurisdiction of each High Court in Malaya, to 8 days and served outside such local jurisdiction but within the jurisdiction of Malaya, to 12 days after service of the writ (including the day of service) or, where that time has been extended by or by virtue of these rules, to that time as so extended; and
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> (b) in the case of a writ served within Sarawak or Sabah, to 10 days after service of the writ (including the day of service) or in the case of a defendant whose place of residence or if an incorporated society whose registered office of business is not within the Division or Residency in

A which is situated the Registry out of which the writ of summons was issued, 20 days after service of the writ (including the day of service);

(c) in the case of a notice of a writ served out of the jurisdiction, to the time limited under Order 10 rule 2(2), or Order 11 rule 4(3), or, where that time has been extended as aforesaid, to that time as so extended.

B It must be remembered that the Rules of the High Court 1980 were made under the authority of the CJA thus giving tacit approval to this jurisdiction of the branch High Courts. For all practical purposes the branch High Courts can thus be considered as having their own jurisdiction. In my opinion it would therefore be oppressive and vexatious to commence proceedings in a branch of the High Court in Malaya when it could have C been more suitably or appropriately commenced in another branch as it would defeat the very object for which the branch High Courts were set up. This would amount to a defendant being improperly vexed by legal procedure if a plaintiff is to be allowed to choose a branch High Court of his choice by virtue of the local jurisdiction of the High Court in Malaya. As Scott LJ said in *The Atlantic Star* it is part of the general jurisdiction of the D court to prevent such abuse. The corollary is that an action should be filed and heard in the proper branch of the High Court in Malaya. Thus as illustrated by *Sova Sdn Bhd* a branch High Court can decline to exercise its jurisdiction even when the other forum is another branch court. However, where a person is properly served within the jurisdiction for a matter over E which the court has jurisdiction a stay can be granted only on very strong grounds (see *Loke Wan Tho v Lachie Mcdonald & Ors* [1949] MLJ 293). Where a case is filed in the wrong branch of the High Court then it would constitute very strong grounds for the court to decline to exercise its jurisdiction to hear the case in the light of the reasons that I have discussed. With regard to the conditions to be satisfied in choosing the correct branch F of the High Court it is my view that proof of the provisions of s 23(1) of the CJA will meet the requirement of the conditions laid down in *St Pierre*. Thus s 23(1) of the CJA, enacted to determine the territorial jurisdiction of the two High Courts in Malaysia, should serve as the basis for the jurisdiction of the branch High Courts.

G It is now appropriate to consider the power of a branch High Court to transfer a proceeding pending before it to another branch High Court. This is governed by para 12 of the Schedule to CJA ('para 12'). It is in the following terms:

> Power to transfer any proceedings to any other Court or to or from any subordinate court, and in the case of transfer to or from a subordinate court H to give any directions as to the further conduct thereof:
>
> Provided that this power shall be exercised in such manner as may be prescribed by any rules of Court.

Three issues arise for observation in the interpretation of para 12.

I The first is whether the word 'Court' in the phrase 'Power to transfer any proceeding to any other *Court* ... .' (emphasis added) in para 12 is confined in its meaning to the High Court in Malaya and the High Court

inSabah and Sarawak bearing in mind the definition of the word 'Court' in s 3 of the CJA as 'the High Court' and the phrase 'the High Court' as 'the High Court in Malaya and the High Court in Sabah and Sarawak or either of them, as the case may require' or whether it extends to the branch High Courts. In my opinion the use of the word 'any' in the phrase 'Power to transfer any proceeding to *any* other Court ....' (emphasis added) is clear indication that the word 'Court' goes beyond the two High Courts. If the intention of the legislature was to confine the operation of para 12 to just the two High Courts then it would have used the word 'the' instead of 'any' as in s 23(1) of the CJA. It must be noted that a definition provided for a word or phrase by s 3 of the CJA does not apply if the context in which it is used otherwise requires. Thus the context of para 12 requires the word 'Court' to be given a meaning other than that provided in the definition section of the CJA to include branch High Courts.

The second is that the power given to transfer any proceeding is only from a High Court 'to' any other High Court and not 'from' any other High Court to itself. This is made manifestly patent by the use of the word 'to' in the phrase 'Power to transfer any proceedings *to* any other Court ...' (emphasis added) in para 12. That the power to transfer proceedings is restricted as I have described finds further support in the language employed in para 12 itself in the case of transfer of proceedings in the subordinate courts which is widely worded to authorize transfer '... to or from any subordinate court ....'. It is therefore clear that a High Court is only empowered to transfer an action pending before it 'to' any other High Court and not 'from' any other High Court to itself. Consequently an order made by a High Court transferring a case to itself from another High Court would be without jurisdiction and, accordingly, ultra vires the explicit words of para 12.

The final matter for consideration relates to the exercise of the power itself that has been conferred by para 12 to transfer a proceeding to any other court in the light of the proviso to it. A power which a court of law has includes not only jurisdiction to entertain a suit but also execution of any decree passed therein (see *Pramatha Nath v State of West Bengal* 70 CWN 503). In *Re Sterling; ex p Esanda Ltd* (1980) 30 ALR 77 it was held that if a power is conferred upon a body by a statute there is implied as a concomitant of that power, the power to perform it. Thus the power conferred by the enacting part of para 12 relates not only to the power to exercise the jurisdiction to transfer a proceeding to another High Court but also to the power to execute or carry out any order made. However, the proviso to the paragraph provides that the power conferred shall be exercised in such manner as may be prescribed by rules of court. It must be noted that a proviso is not a substantive provision (see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145). The proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case (see *Madras & Southern Maharatta Rly Co Ltd v Bezwada Municipality* AIR 1944 PC 71). When there is a proviso to a

section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject matter of the proviso (see *Mullins v The Treasurer of The County of Survey* (1880) 5 QBD 170. It follows that the proviso to paragraph 12 refers to matters that are within the scope of the paragraph. What now requires consideration is the precise nature of the power that the proviso has excepted from the para. As the jurisdiction of the High Court is unlimited (see *Scotch Leasing Sdn Bhd (In receivership) v Chee Pok Choy & Ors* [1997] 2 MLJ 105) it cannot be capable of being prescribed (see *Lee Lee Cheng v Seow Peng Kwang* [1960] MLJ 1). The rules contemplated by the proviso to para 12 cannot therefore apply to the jurisdiction of the court to entertain a transfer application. Accordingly the proviso must refer only to the power which is concerned with the manner of execution of an order for transfer that has been made. This would relate to the manner of performing and carrying out the order made. This is clear from the language of the proviso itself as it refers only to the manner of exercising the power and not to the jurisdiction to exercise the power itself.

The addition of the proviso to the paragraph reflects the wisdom of the legislature. This is because any order made for the transfer of a proceeding by a High Court to another High Court would in fact be a direction that the case be heard by another court of co-ordinate jurisdiction. This must be further read against the background of s 20 of the CJA which provides that the distribution of business among the judges of the High Court is at the direction of the Chief Judge. The complexity of the transfer of a proceeding from a High Court to another High Court of co-ordinate jurisdiction can be seen in the old English case of *Humphreys v Edwards* (1875) 1 Char Pr Cas 81 where it was held that an order for the transfer of a cause from one division of the High Court to another is not effectual until the sanction has been obtained of the President of the Division to which it is proposed to transfer the cause. Thus the need for rules to be made to regulate matters relating to the execution or the carrying out of an order for transfer made by a High Court to another High Court requires no emphasis. In England, s 65 of the Supreme Court Act 1981 governs the power to transfer a proceeding from one division of the High Court to another while O 4 of the Rules of the Supreme Court prescribes the manner of exercising the power.

Up to now no rules have been made as stipulated by the proviso to para 12. That raises the question of whether the power that has been conferred by the paragraph to transfer a proceeding can be exercised even though no rules have been made as required by its proviso. In *Surinder Singh v Central Government & Ors* AIR 1986 SC 2166, it was held that if the formulation of rules is a condition precedent to the exercise of a power given by a statute then in the absence of any such rules the power cannot be exercised. Singh J in writing for the court in that case said at p 2169:

> Where a statute confers powers on an authority to do certain acts or exercise power in respect of certain matters, subject to rules, the exercise of power conferred by the statute does not depend on the existence of rules unless the

> statute expressly provides for the same. In other words framing of the rules is not condition precedent to the exercise of the power expressly and unconditionally conferred by the statute. The expression 'subject to the rules' only means, in accordance with the rules, if any. If rules are framed, the powers so confirmed on authority could be exercised in accordance with these rules. But if no rules are framed there is no void and the authority is not precluded from exercising the power conferred by the statute.

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And at p 2170:

> If the legislative intent was that until and unless rules were framed power conferred on the authority under ss 8, 16 and 20 could not be exercised, that intent could have been made clear by using the expression 'except in accordance with the rules framed' a displaced person shall not be paid compensation by sale of pool property. In the absence of any such provision the framing of rules could not be a condition precedent for the exercise of power.

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It follows that in the absence of any rules having been made as required by the proviso to para 12 the exercise of the power conferred by the paragraph would depend on whether the rules constitute a condition precedent to the exercise of such power. This in turn would depend on the legislative intent with which the rules were required to be framed. The intention of the legislature can be ascertained not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it one way or the other (see *Arunima Das v Secretary, Board of Secondary Education* AIR 1957 Cal 182; *Thangaman v Chief Secretary, Madras* AIR 1965 Mad 225). It is the duty of the court to fathom the real intention of the legislature by carefully attending to the whole scope of the enactment (see *Narendra Nath Nandi v Amiya Chowdry* 63 CWN 216). It has been held that enactments regulating the procedure to be followed in courts are usually imperative and not merely directory (see *PP v Oie Hee Koi & Associated Appeals* [1968] 1 MLJ 148). As I said earlier the legislature has excepted the manner of execution of an order that has been made from the enacting part of para 12. As this power has been taken out from the enacting part of the paragraph it is not exercisable unless rules are made as stipulated in the proviso. The result is that the enacting part of the paragraph is only left with the power to order a transfer with no power to perform or carry out the order so made. An order made without power to enforce it will be ineffectual. This is particularly significant as the proviso is designed to regulate the procedure to be followed when an order is made for the transfer of a case from a High Court to another court of co-ordinate jurisdiction. It is therefore my view that the exercise of the power conferred by para 12 depends on the existence of rules contemplated by its proviso as any order made without any rules to that effect would be ineffectual as it cannot be carried out. The language employed in the proviso also supports this conclusion. The use of the word 'shall' in the proviso gives it a mandatory effect. The use of the word 'provided' to introduce the proviso is also significant. As *Black's Law Dictionary* (6th Ed) says this word ordinarily '... signifies or expresses a condition'. In the premises it is my

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view that the rules contemplated by the proviso constitute a condition precedent to the exercise of the power conferred by para 12. Thus in the absence of any rules having been made the power conferred by the paragraph cannot be exercised.

It is also necessary to consider the case of *PP v Seeralan* [1985] 2 MLJ 30 which dealt with a similar issue where rules had not been made as required. In that case Salleh Abas LP in writing for the Federal Court said at p 34:

> The magistrate's power under para 26 of the Third Schedule of the Subordinate Courts Act to take cognizance of any contempt of court and to award punishment for the same is exercisable to 'such extent and in such manner as may be prescribed by rules of court'. Order XXXVIII r 1 of the Subordinate Courts Rules 1950 made provisions for the exercise of this power and Abdoolcader J (as he then was) held in *Re Kumaraendran* that the rule applied to a contempt of court committed in the face of the court in respect of proceedings of a civil nature as well as or at best by analogy to those of a criminal nature because the rule is 'a statutory crystallisation of an established principle of law'. However, when the Subordinate Courts Rules 1980 came into effect replacing the 1950 Rules, the provisions of O XXXVIII r 1 of the 1950 Rules were not retained. There is, therefore, no provision in the present Subordinate Courts Rules regarding the exercise of this power by the magistrate either in respect of civil proceedings or criminal proceedings. In our view the absence of such provision in the rules of court does not mean that the power cannot be exercised. The magistrate can effectively exercise the power so long as the contemnor is given an opportunity of being heard. For this purpose we refer to the principle enunciated by Sir Jocelyn Simon P in *Qureshi v Qureshi* [1971] 2 WLR 518 where he said:
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> > '... where a legislative authority by an enactment setting up a tribunal or other body envisages rules to be made governing the procedure of such tribunal or body, and no such rules are made, the tribunal or body is not necessarily thereby disabled from performing its function. In such case the tribunal or body acts effectively provided it acts in accordance with natural justice and to promote the objective with which it was set up, and possibly by analogy with the rules of procedure prescribed for comparable tribunals or bodies.'
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> In this context the guideline provided for by Ali J (as he then was) in *PP v Lee Ah Keh & Ors* [1968] 1 MLJ 22 still stands.

The reference to the application of the rules of natural justice as a substitute for the required rules means that the principle in *Seeralan* is relevant only when the rules govern the hearing process. To my mind this is logical as rules required to be made to regulate the hearing process would themselves be based on the rules of natural justice. The absence of any such rules can therefore be readily and validly met by an application of the rules of natural justice. Thus in *Tan Choon Chye v Singapore Society of Accountants* [1979] 2 MLJ 61, it was held that the absence of any rules to regulate the manner of holding an inquiry did not preclude an inquiry being held if it is conducted in accordance with the rules of natural justice. As the rules required by the proviso to para 12 do not relate to the hearing of the

application for transfer itself but to the manner of execution of the order made following the hearing process the question of the principles of natural justice taking the place of the required rules does not arise. Even if it can be argued that the rules contemplated by the proviso to para 12 can be substituted with comparable legislation then the legislation must be one that relates to the execution of an order made by a High Court which affects another court of co-ordinate jurisdiction. There is no such comparable legislation at the moment. In the premises the principle enunciated in *Seeralan* is inapplicable to this case and the High Court is disabled from exercising the power conferred by para 12 on that reasoning.

The fact that the power conferred by para 12 cannot be exercised does not mean that a party who wishes to have a case transferred from one branch of the High Court to another branch is without any remedy. He may obtain the desired result in accordance with s 20 of the CJA which reads as follows:

> The distribution of business among the Judges of the High Court shall be made in accordance with such directions, which may be of a general or a particular nature, as may be given by the Chief Judge.

The word 'distribution' is defined in *Black's Law Dictionary* (6th Ed) as:

> The giving out or division among a number, sharing or parcelling out, allotting, dispensing, apportioning.

Thus the section deals with the allotment or dispensing of work among the judges of the High Court in accordance with directions given by the Chief Judge. The nature of this function is clearly administrative in nature. It must be observed that the exercise of this power by the Chief Judge also includes a direction which can be given with respect to a single case. This flows from the use of the words '... a particular nature ...' in the section which means that the Chief Judge may direct that a particular case shall be heard by a particular High Court Judge. It would also include the sending of a case file pending before a judge of the High Court to another Judge of the High Court at a different branch. A party who desires to have a case pending in a particular High Court to be heard by another High Court may therefore apply to the Chief Judge for directions to that effect. Needless to say there can be no appeal against any direction given by the Chief Judge.

What I have said thusfar would arise for consideration in this case only if, in the first place, the plaintiff's case has been filed in the wrong branch of the High Court contrary to the provisions of s 23(1) of the CJA. The principal contention of the defendant is that this action should be tried in the High Court in Malaya at Kuala Lumpur in accordance with s 23(1) of the CJA as he resides there. It thus becomes necessary to consider the legal effect of the section. It has four sub-paragraph. The comma appearing at the end of sub-para (a), (b), (c) and (d) in the section followed by the word 'or' means that they must be construed disjunctively. Thus a party instituting a proceeding in a particular branch of the High Court may do so if his case falls within any one of the sub-paragraph. That was the basis on which Abdul Hamid J (as he then was) determined the jurisdiction of the court in *Lam Kok Trading Co (Pte) Ltd & Anor v Yorkshire Switchgear & Engineering Co Ltd* [1979] 1 MLJ 239.

A In this case, sub-para (b) and (d) clearly cannot apply in favour of the plaintiff as the defendant resides in Kuala Lumpur and the subject matter of this action is not land. That leaves for consideration sub-para (a) and (c) of the section. I shall first consider sub-para (a). With regard to accrual of a cause of action in contract cases it is deemed to have occurred at the place where the breach took place. In support of this principle I refer to the case B of *Cuban Atlantic Sugar Sales Corp v Compania De Vapores San Elefterio Limitada* [1960] 1 All ER 141 where Lord Hodson LJ said at p 143:

> ... The question is not whether a breach must be deemed to have been committed, or whether a breach must necessarily be taken to have been committed when the defendants have put themselves in the wrong, but C whether a breach has been committed in the United Kingdom.

And Ormerod LJ said in the same case at p 145:

> ... Counsel for the defendants at the beginning of his argument said (and I think rightly) that the jurisdiction of the courts under RSC Ordinance 11 rule 1 should be administered with the greatest care, as it is a rule which tends to D encroach on the sovereignty of other nations. Bearing that in mind, one has to consider the one and only important question in this appeal, and that is whether the defendants have committed a breach of contract within the jurisdiction.

In a contract for the payment of money the breach occurs when there is a E failure to pay the sum promised. This is logical as the meaning of 'cause of action' is the act on the part of the defendant which gives the plaintiff his cause of complaint (see *Jackson v Spittall* (1870) LR 5 CP 542). The failure to pay will be the cause of complaint. That breach will have to be at the place where the payment is to be made and the cause of action will therefore accrue in that place (see *Bank Bumiputra Malaysia Bhd v Melewar Holdings* F *Sdn Bhd & Ors* [1990] 1 CLJ 1246). Where there is no agreement as to the place where the payment should be made then the payment should be made at the place where the plaintiff lives. In this regard I refer to *Northey Stone Co v Gidney* [1894] 1 QB 99 where Charles J said at p 100:

> The action is brought to recover the balance of the price of goods sold and delivered. According to the law applicable to contracts, there being no special G stipulation as to the place of payment, the defendant must pay at Bath, where his creditors, the plaintiffs, live.

In this case the plaintiff's registered address is in Melaka. The defendant opened an account with the plaintiff in Melaka. The defendant conducted his share transactions in Melaka. The amount due on the account is H therefore payable in Melaka. If there is to be any dispute on this issue it is resolved by the fact that the plaintiff's registered office is in Melaka thereby making Melaka the venue for payment of the sum due. In the circumstances the breach in payment of the sum due occurred in Melaka. The plaintiff's cause of action therefore arose in Melaka. The plaintiff's case also comes within sub-para (c) as the facts on which the action is based occurred in I Melaka. I pause to add that the defendant's denial of liability is a matter for resolution at the trial and does not alter the conclusion that I have drawn. As the plaintiff has brought itself within s 23(1)(a) and (c) of the CJA it is

entitled to file this action in Melaka notwithstanding the fact that the defendant resides in Kuala Lumpur. The defendant's application is therefore without any merit.

In the result, I dismissed the application with costs. This appeal is against that order.

Application dismissed with costs.

Reported by Jafisah Jaafar